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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **EASTERN DIVISION**

12 GERALD KOSTECKA,

13 Plaintiff,

14 v.

15 SIRIUS XM RADIO INC.,

16 Defendant.
17

} **Case No.:**

} **PLAINTIFF’S COMPLAINT**

18
19 **PLAINTIFF’S COMPLAINT**

20 Plaintiff, GERALD KOSTECKA (“Plaintiff”), through his attorneys, Agruss Law
21 Firm, LLC, alleges the following against Defendant, SIRIUS XM RADIO INC.
22 (“Defendant”):

23
24 **INTRODUCTION**

- 25
26 1. Plaintiff’s Complaint is based on the Telephone Consumer Protection Act., 47
27 U.S.C. § 227, et seq. (“TCPA”).
28

JURISDICTION AND VENUE

2. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337.
3. This court has federal question jurisdiction because this case arises out of violations of federal law. 47 U.S.C. § 227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).
4. Venue and personal jurisdiction in this District are proper because Defendant does or transacts business within this District, and a material portion of the events at issue occurred in this District.

PARTIES

5. Plaintiff is a natural person residing in the City of Temecula, Riverside County, State of California.
6. Plaintiff is, and at all times mentioned herein, a “person” as defined by 47 U.S.C. § 153(39).
7. Defendant is, and at all times mentioned herein, a “person” as defined by 47 U.S.C. § 153(39).
8. Defendant is a Delaware business corporation based in the City of New York, New York County, State of New York.
9. Defendant acted through its agents, employees, officers, members, directors, heirs, successors, assigns, principals, trustees, sureties, subrogees, representatives, and insurers.

FACTUAL ALLEGATIONS

10. Within four (4) years of Plaintiff filing this Complaint, in or around May 2018, Defendant began calling Plaintiff's cellular telephone at xxx-xxx-2690, which included or introduced an advertisement or constituted telemarketing.

11. Within four (4) years of Plaintiff filing this Complaint, starting in or around May 2018, Defendant has called Plaintiff's cellular telephone from at least, 855-378-6702 and 606-284-0322, which are two of the Defendant's telephone numbers.

12. In or around May 2018, Plaintiff first answered a call placed by Defendant to Plaintiff.

13. During the aforementioned call, Plaintiff told Defendant to stop calling him.

14. Despite Plaintiff's request that Defendant stop calling Plaintiff, Defendant continued to call Plaintiff's cellular telephone.

15. None of the calls Defendant made to Plaintiff were for an emergency purpose.

16. All of the calls Defendants made to Plaintiff's cellular telephone resulted in Plaintiff incurring a charge for incoming calls.

17. During at least one conversation, Defendant learned that Plaintiff wanted Defendant to stop calling Plaintiff's cellular telephone.

18. Plaintiff has never given to Defendant prior express written consent to contact Plaintiff as described herein.

19. Even if Plaintiff provided Defendant with his cellular telephone number,

1 Defendant failed to provide Plaintiff with clear and conspicuous disclosure that
2 Defendant would contact Plaintiff with an automatic telephone dialing system
3 (“ATDS”).
4

5 20. Even if at one point Defendant had prior express written consent to call Plaintiff’s
6 cellular telephone, Plaintiff revoked this consent as described above.
7

8 21. Defendant continued to call Plaintiff’s cellular telephone after Defendant knew
9 Plaintiff wanted the calls to stop.
10

11 22. Within four (4) years of Plaintiff filing this Complaint, Defendant used an ATDS
12 to call Plaintiff’s cellular telephone.
13

14 23. When Plaintiff answered Defendant’s calls, he was sometimes greeted with “dead
15 air” whereby no person was on the other end of the line. After several seconds,
16 an agent was connected to the automated call then greeted Plaintiff and sought to
17 speak with Plaintiff to solicit the sale of Defendant’s products or services.
18

19 24. The telephone dialer system Defendant used to call Plaintiff’s cellular telephone
20 has the capacity to store telephone numbers.
21

22 25. The telephone dialer system Defendant used to call Plaintiff’s cellular telephone
23 has the capacity to call stored telephone numbers automatically.
24

25 26. The telephone dialer system Defendant used to call Plaintiff’s cellular telephone
26 has the capacity to call stored telephone numbers without human intervention.
27

28 27. The telephone dialer system Defendant used to call Plaintiff’s cellular telephone

1 has the capacity to call telephone numbers in sequential order.

2 28. The telephone dialer system Defendant used to call Plaintiff's cellular telephone
3 has the capacity to call telephone numbers randomly.
4

5 29. The telephone dialer system Defendant used to call Plaintiff's cellular telephone
6 selects telephone numbers to be called according to a protocol or strategy entered
7 by Defendant.
8

9 30. The telephone dialer system Defendant used to call Plaintiff's cellular telephone
10 simultaneously calls multiple recipients.
11

12 31. The dead air that the Plaintiff may have experienced on the calls that he received
13 is indicative of the use of an ATDS. This "dead air" is commonplace with
14 autodialing and/or predictive dialing equipment. It indicates and evidences that
15 the algorithm(s) being used by Defendant's autodialing equipment to predict
16 when the live human agents are available for the next call has not been perfected
17 and/or has not been recently refreshed or updated. Thus, resulting in the
18 autodialer placing a call several seconds prior to the human agent's ability to end
19 the current call he or she is on and be ready to accept the new connected call that
20 the autodialer placed, without human intervention, to Plaintiff. The dead air is
21 essentially the autodialer holding the calls it placed to Plaintiff until the next
22 available human agent is ready to accept them. Should the calls at issue been
23 manually dialed by a live human being, there would be no such dead air as the
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1 person dialing Plaintiff's cellular telephone would have been on the other end of
2 the call the entire time and Plaintiff would have been immediately greeted by said
3 person.
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5 32.As a result of Defendant's alleged violations of law by placing these automated
6 calls to Plaintiff's cellular telephone without prior express written consent,
7 Defendant caused Plaintiff harm and/or injury such that Article III standing is
8 satisfied in at least the following, if not more, ways:
9

- 10
- 11 a. Invading Plaintiff's privacy;
 - 12 b. Electronically intruding upon Plaintiff's seclusion;
 - 13 c. Intrusion into Plaintiff's use and enjoyment of his cellular telephone;
 - 14 d. Impermissibly occupying minutes, data, availability to answer another
15 call, and various other intangible rights that Plaintiff has as to complete
16 ownership and use of his cellular telephone; and
 - 17 e. Causing Plaintiff to expend needless time in receiving, answering, and
18 attempting to dispose of Defendant's unwanted calls

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**DEFENDANT VIOLATED THE TELEPHONE CONSUMER PROTECTION
ACT**

33.Defendant's conduct violated the TCPA by:

- a. Placing non-emergency telephone calls to Plaintiff's cellular telephone
using an automatic telephone dialing system and/or pre-recorded or
artificial voice in violation of 47 U.S.C. § 227 (b)(1)(A)(iii).

WHEREFORE, Plaintiff, GERALD KOSTECKA, respectfully requests
judgment be entered against Defendant, SIRIUS XM RADIO INC., for the following:

34.As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff

1 is entitled to and requests \$500 in statutory damages, for each and every violation,
2 pursuant to 47 U.S.C. § 227(b)(3)(B).
3

4 35.As a result of Defendant's willful and/or knowing violations of 47 U.S.C.
5 § 227(b)(1), Plaintiff is entitled to and requests treble damages, as provided by
6 statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C.
7 § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
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9 36.Plaintiff is entitled to and seeks injunctive relief prohibiting such conduct in the
10 future.
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12 37.Any other relief that this Honorable Court deems appropriate.
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14 DATED: November 12, 2018 Respectfully submitted,
15 AGRUSS LAW FIRM, LLC

16
17 By /s/ Michael S. Agruss
18 Michael S. Agruss
19 Attorney for Plaintiff
20 GERALD KOSTECKA
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